In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1303

CITY OF NEW ORLEANS and ROBERT E. DEVELLE, DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, PETITIONERS

v.

UNITED STATES OF AMERICA and CHRYSLER CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

This is an action by the United States and Chrysler Corporation to recover approximately $545,000 in city use taxes and interest which Chrysler paid under protest. Pursuant to a contract with the United States, Chrysler undertook to acquire for the government the machinery and equipment necessary

to adapt the Michoud Ordnance Plant in New Orleans to produce military tank engines. Petitioners assessed use taxes upon Chrysler's use of the property which it acquired for the government in carrying out this contract. Chrysler entered into an agreement with petitioners for payment of the tax by delivering cash and bonds to be held in safekeeping pending a final judicial determination. Pursuant to their contract, the United States reimbursed Chrysler for the amount paid under protest, and the government is entitled to any part of the fund recovered. (Pet. 18-19; R. 16-22, 46, 65-71).[1]

Chrysler instituted a suit for refund in a Louisiana State court, and the United States subsequently intervened. The Supreme Court of Louisiana determined in that litigation (1) that the city ordinance[2] taxed only the use of tangible personal property by its *owner*, not the use of the property by someone else, and (2) that the United States, not Chrysler, was the owner of the property in question. *Chrysler Corp.* v. *City of New Orleans* (Pet. 35-51, 53-63). Based on this conclusion, the Supreme Court of Louisiana held (1) that Chrysler did not have the requisite standing under Louisiana procedure to maintain the suit for a refund since it was not the owner of the property and had been reimbursed by the United States (Pet. 57), and (2) that this conclusion

---

[1] "R." references are to the printed record filed in the court of appeals.

[2] Sections 1(1) and 2, Ordinance No. 15,201, Commission Council Series (Pet. 18, fn. 3).

required dismissal of the government's intervention, since under Louisiana law an intervenor cannot maintain the action after the main demand of the plaintiff has been dismissed (Pet. 58-59).

The United States then instituted the instant case in a federal court as an independent action to recover the fund based on unjust enrichment, money had and received, and the escrow agreement, contending that since the city may not tax the United States on property owned by the United States[3] and the ordinance did not purport to tax Chrysler, a non-owner, it followed that the tax was invalidly collected (R. 8-11). Chrysler has been joined as a party plaintiff only to insure that the United States is granted complete relief. The district court granted summary judgment for the United States (R. 84-85; see also R. 29, 32-33, reported at 215 F. Supp. 895). The court of appeals affirmed (371 F. 2d 21, rehearing denied, Pet. 33), holding (1) that the district court had "ample power * * * to protect the sovereign against such unjust enrichment on familiar principles of money had and received" (Pet. 28-29), and (2) that petitioners were collaterally estopped from relitigating the determination of the Louisiana courts that the United States, not Chrysler, was the owner of the property (Pet. 22-28).

The decision below is correct, and there is no conflict or other basis for further review.

---

[3] *McCulloch* v. *Maryland*, 4 Wheat. 316, 436; *United States* v. *Allegheny County*, 322 U.S. 174, 176-177.

1. Petitioners first argue that the court of appeals erred in holding petitioners collaterally estopped by the Louisiana courts' determination that the United States owned the property. Petitioners' argument, that the prior determination should not be controlling because it is wrong, contradicts the very bases underlying the doctrines of *res judicata* and collateral estoppel—*i.e.*, "considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations." *Commissioner* v. *Sunnen*, 333 U.S. 591, 597. If the issue has been decided between the parties, then it matters not in subsequent litigation between them whether it was decided rightly or wrongly. As this Court stated in *United States* v. *Moser*, 266 U.S. 236, 242, "a *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law" (emphasis in original). See also *Scotland County* v. *Hill*, 112 U.S. 183, 187; *Gunter* v. *Atlantic Coast Line R. R. Co.*, 200 U.S. 273, 290. As the court of appeals demonstrated (Pet. 24-28), the issue of ownership was central to the decision in the State court proceedings and was considered and resolved by the Louisiana courts.[4]

---

[4] Petitioners' suggestion that the Louisiana Supreme Court did not make a finding of ownership from the record (Pet. 10-11) is not supportable. On the second hearing, after a full trial on the merits, the Louisiana Supreme Court specifically stated that "The record discloses that the title of the property at no time vested in Chrysler, but passed directly from the various vendors to the United States" (Pet. 56).

Petitioners' attempt to have the federal courts reverse the determination of ownership made by the Louisiana State courts is curious. In the State court proceedings they contended that the United States was the owner and, consequently, that Chrysler lacked standing to maintain that action (Pet. 26-27, fns. 13-15). As the court of appeals noted (Pet. 27), "The City cannot have it both ways. It cannot claim the Government is the owner to deny standing to Chrysler, the payor, and when that is achieved turn on the Government to say that Chrysler was the owner." [5]

2. Petitioners also argue that the district court lacked jurisdiction to entertain this action. From *N.A.A.C.P.* v. *Button*, 371 U.S. 415, and *England* v. *Medical Examiners*, 375 U.S. 411, petitioners conclude that the prior litigation in the State courts bars the United States from seeking recovery in the federal courts, so that "protracted litigation" may be prevented (Pet. 11-13). The *Button* and *England* de-

[5] Nor is there any merit in petitioners' argument that the Louisiana Supreme Court erroneously found that the United States was the owner. The contract specifically provided that title vested in the government upon acquisition by Chrysler (Pet. 23, fn. 7); thus there was no basis for finding ownership in Chrysler (Pet. 45-49, 50). See *Avco Mfg. Corp.* v. *Connelly*, 145 Conn. 161, 140 A. 2d 479; *General Motors Corp.* v. *State Com'n. of Rev. & Taxation*, 182 Kan. 237, 320 P.2d 807, certiorari denied, 358 U.S. 875. Moreover, since Chrysler's acquisitions were entirely on behalf of and under the control of the government (Pet. 50-51), it acted as the government's agent in making them and the property thus acquired belonged to the government. See *Avco Mfg. Corp.* v. *Connelly, supra; General Motors Corp.* v. *State Com'n. of Rev. & Taxation, supra.*

cisions dealt with cases originating in the federal courts but referred to State courts under the doctrine of abstention. The rule announced in *England* is that a party to such a case has no right to relitigate federal questions in the federal district court if he "freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there * * *." 375 U.S. at 419.

Contrary to petitioners' statement (Pet. 12), the Louisiana State courts did not decide the claim of the United States for recovery of the fund. The prior State court proceedings, instituted by Chrysler with the United States as intervenor, terminated with the conclusion that while the United States owned the property (thus rendering the tax invalid), Chrysler lacked the requisite standing to recover the tax. The government's intervention fell, under Louisiana law, with the main demand (Pet. 58-59). As the court of appeals noted, after such a dismissal the intervenor is, under Louisiana law, "relegated to asserting his cause of action by an independent action" (Pet. 28, fn. 16). And this it is free to do in the forum of its choice, including the federal district court.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

HAROLD C. WILKENFELD,
J. EDWARD SHILLINGBURG,
Attorneys,
Department of Justice.

EUGENE D. SAUNDERS,
DAVID J. CONROY,
GUY C. LYMAN, JR.,
Attorneys for Chrysler Corporation.

MAY 1967.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 262902 882